§ 6.1. Extinguishing Easements with Obstructive Fencing Through the Doctrine of Prescription.* In Massachusetts, property owners can extinguish easements\(^1\) over their land through prescription,\(^2\) a corollary to the reverse doctrine of creating prescriptive easements over real estate.\(^3\) To extinguish an easement by prescription, the owner of the property on which the easement exists (the servient estate) must prove that he or she adversely "used the way in a manner so inconsistent with the . . . easement that it . . . [worked] an extinguishment of it after the lapse of twenty years."\(^4\) As with the related doctrine of adverse possession,\(^5\) effective prescription requires the owner of the servient estate, absent permission, to interfere with the easement's use in an openly adverse manner for twenty continuous years.\(^6\) It is difficult sometimes to establish the requisite adverse nature of some uses since the owner of the servient estate can utilize the property in any manner not interfering with the easement or its use.\(^7\) During the Survey year, in *Yagjian v. O'Brien*,\(^8\) the Appeals

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\(^{\dagger}\) John G. Casagrande Jr., David S. Newman.  
\* John G. Casagrande Jr., staff member, *Annual Survey of Massachusetts Law*.  
\(\S\) 6.1. 'An easement is a right of use over the property of another. *Black's Law Dictionary* 457 (5th ed. 1979).  
\(^1\) Prescription is a mode of acquiring a right to use an incorporeal hereditaments (i.e. intangible rights) by continuous use. *Id.* at 1064–65.  
\(^4\) Adverse possession differs from prescription only in that the former requires exclusivity of control with respect to third parties by the possessor. 2 *Thompson on Real Property* § 335, at 142–43 (1980).  
\(^5\) *3 Powell on Real Property* § 424, at 34-258 (1985). See *infra* note 17 for Massachusetts statute.  
\(^6\) *Id.* at ¶ 424, at 34-260-61.  
Court of Massachusetts found that unbroken boundary fencing, as distinguished from moveable gates and barways, constituted an adverse prescriptive use over a right of way easement.

In Yagjian, the plaintiff easement owner had acquired property and a right of way easement over adjacent land in 1953. The easement had been created by prior owners in 1941 and recorded in the deed. Proceeding along a side boundary of the servient estate, the right of way connected a frontal road and the plaintiff’s back property. The easement consisted of rights “to pass and repass [and] to install water, gas and electric light lines over a strip of land 40 feet wide.” In 1965, the defendants purchased the servient estate and built an equestrian riding track encroaching on the right of way.

In 1981, the plaintiff instituted an action in the Land Court Department of the Massachusetts Trial Court to substantiate his claim to the right of way easement. Despite plaintiff’s testimonial evidence to the contrary, the court held that the easement was extinguished due to the prescriptive use over it by the servient estate. The court found that an unbroken partial stone and wire boundary fence on the servient estate, separating the plaintiff’s and defendants’ property, had obstructed the right of way since at least 1951. The court found this structure to be adverse to the right of way for the twenty year statutory period and ruled the easement extinguished.

In upholding the lower court on appeal, the Suffolk County Appeals Court in Yagjian concentrated on the adverse nature of servient estate

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9 Id. at 733–34, 477 N.E.2d at 203.
10 Id. at 733, 477 N.E.2d at 203.
11 Id.
12 Id.
13 Id. at 733–34, 477 N.E.2d at 203.
14 The plaintiff argued that he had continuously walked the right of way over the years and that no fences or walls had prevented him from doing so. Id. at 734, 477 N.E.2d at 203. He further testified that the prior owners and defendants had both asked his permission to erect a fence, which he had given with the caveat that it was to be removed at his request to enable him to use the right of way. Id. The land court judge refused to adopt this testimony as a finding, despite a motion by the plaintiff to amend the court’s original findings. Id.
15 Id. at 733–34, 477 N.E.2d at 203.
16 Id. at 734, 477 N.E.2d at 203.
17 The Massachusetts statutory period is found in G.L. c. 187, § 2 (1977): “No person shall acquire by adverse use or enjoyment a right or a privilege of way or other easement from, in, upon or over the land of another, unless such use or enjoyment is continued uninterruptedly for twenty years.”
18 Yagjian, 19 Mass. App. Ct. at 734, 477 N.E.2d at 203. Whatever fences the defendants had erected, with or without permission, did not exist for at least twenty years and had no impact on the easement. Id. at 734 n.3, 477 N.E.2d at 203 n.3. See also supra note 14.
boundary fencing to rights of way. The court found that unbroken fencing, by its nature, was meant to impede passage, directly precluding the ability of the easement owner to utilize his right of way.\textsuperscript{19} The court contrasted such an obstruction with unlocked gates and barways, characterizing the latter as burdening, delaying, \textit{but contemplating} passage.\textsuperscript{20} The appeals court reasoned that a prescriptive act exists wherever the owner of a servient estate unreasonably uses the property in a manner inconsistent with the easement or its use,\textsuperscript{21} thereby giving the easement owner a cause of action for trespass against the owner of the servient estate until the passing of the twenty year prescription period.\textsuperscript{22} Since the stone and wire fence in \textit{Yagjian} had frustrated any substantial use of the right of way for at least twenty years, the court held the easement extinguished.\textsuperscript{23} In addition, the court declined to find the easement only partially extinguished, noting the scope and extent of the interference.\textsuperscript{24}

The law of easements and prescription utilized by the \textit{Yagjian} court is established both in Massachusetts and elsewhere.\textsuperscript{25} In \textit{Pappas v. Maxwell},\textsuperscript{26} for example, a common right of way along a boundary between two properties had been established by a deed in 1908.\textsuperscript{27} In an action brought in 1955, the Supreme Judicial Court of Massachusetts found the easement partially extinguished.\textsuperscript{28} The Court reasoned that the existence of a building, rose bushes, and a storage area directly on the easement had rendered the back part of the right of way impossible to use for well over twenty years.\textsuperscript{29} Accordingly, the Court held that portion of the easement extinguished.\textsuperscript{30} Because the obstructions in \textit{Pappas} clearly made any passage impossible, the Court did not find it necessary to establish by further examination the adverse nature of the use.

\textsuperscript{19} \textit{Id.} at 735, 477 N.E.2d at 204.
\textsuperscript{20} \textit{Id.} (emphasis added).
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 735–36, 477 N.E.2d at 204.
\textsuperscript{23} \textit{Id.} at 737, 477 N.E.2d at 205. The court quoted the principle of \textit{Restatement of Property} § 506 (1944): "[a]n easement is extinguished by a use of the servient tenement by the possessor of it which would be privileged if, and only if, the easement did not exist, provided (a) the use is adverse as to the owner of the easement and (b) the adverse use is, for the period of prescription, continuous and uninterrupted." \textit{Yagjian}, 19 Mass. App. Ct. at 736, 477 N.E.2d at 204.
\textsuperscript{24} \textit{Id.} at 736–37, 477 N.E.2d at 204–05. The court did not reveal its reasoning in finding the easement completely extinguished.
\textsuperscript{25} For a comprehensive survey of cases involving gates and fences over rights of way easements, see Annot., 52 A.L.R.3d 9 (1973).
\textsuperscript{26} 337 Mass. 552, 150 N.E.2d 521 (1958).
\textsuperscript{27} \textit{Id.} at 555, 150 N.E.2d at 523.
\textsuperscript{28} \textit{Id.} at 557–58, 150 N.E.2d at 524–25.
\textsuperscript{29} \textit{Id.} at 557, 150 N.E.2d at 524–25.
\textsuperscript{30} \textit{Id.}
Similarly, in *Brooks v. West Boston Gas Co.*, a deeded easement in 1856 provided for a right of way to accommodate a railway track. In an action brought in 1927, the Supreme Judicial Court of Massachusetts found the easement partially extinguished where it had been clearly obstructed by buildings and a fence for many years. Again, the Court did not find it necessary to identify the adverse nature of the servient estate owner’s use.

The *Pappas* and *Brooks* decisions were both cited with approval in *Yagjian*. *Yagjian*, however, involved a stone and wire fence, apparently not as openly adverse an interference as the buildings in *Pappas* and *Brooks*. Consequently, the *Yagjian* court sought to establish the adverse nature of the boundary fence to justify extinguishing the easement.

Although reasonable in its application of traditional prescriptive easement law, the *Yagjian* decision raises several novel issues. First, completely extinguishing the easement was unnecessary and probably erroneous. Second, the court appears to have overstated the adverse nature of the partial stone and wire fence in extinguishing the easement, and failed to demand a greater showing of adversity from the defendant owners of the servient estate. The court’s reluctance to scrutinize the alleged facts and circumstances, and thereby avoid complete extinguishment of the easement, is incongruous with the traditional judicial disfavor of prescription.

While noting that a partial interference with an easement will result only in a partial extinguishment, the *Yagjian* court found that the nature of unbroken boundary fencing precluded any use of the right of way, and extinguished the entire easement. If the easement to pass between the road and the plaintiff’s property was extinguished, however, the partial stone and wire fence never precluded the plaintiff easement owner from utilizing the right of way for water, gas, or electric lines as allowed by the deed. Easements created by grant are never terminated by mere

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32 Id. at 408–09, 157 N.E. at 363.
33 Id. at 410–11, 157 N.E. at 362–63.
35 See infra note 39 and accompanying text.
nonuse. Prescription is not a favored doctrine, and courts limit its scope wherever possible. Therefore, the court should have distinguished between the level of interference created by the fence with passageway and utility lines, and allowed that part of the easement not rendered impossible to use—such as subterranean or aerial utility lines—to remain.

Although the Yagjian court adopted evidence showing that the partial stone and wire strand fence existed, the court should have demanded a more stringent showing of openly adverse use from the defendant before extinguishing the right of way easement. The boundary fence at issue apparently existed as far back as 1951 or 1946, before either party owned their property. The fence appears to have been built by the original property owners after they had established the access easement and recorded it in a deed. This suggests that they did not regard or intend the fence to be adverse to the easement they had created. Furthermore, subsequent owners—the Yagjian plaintiff and defendants—also did not view the stones or wires as adversely obstructing the easement, since testimony established that the defendants sought the plaintiff’s permission to erect a different fence encroaching on the right of way. As the Appeals Court pointed out, this testimony “undercut” the lower court’s finding that the defendants “exercised complete, continuous dominion and control over the way to the exclusion of all others.” Such evidence makes it unlikely that the plaintiff easement owner was on either actual or constructive notice as to the adverse use. As a result, the plaintiff should not be penalized for failing to protect his rights when no open and notorious use threatened them. In view of the questionably obstructive nature of the stones and wires and the parties’ regard of them, the court should have demanded from the defendant owner of the servient estate stronger evidence of a clearly open and notorious adverse use.

38 2 Thompson on Real Property § 443, at 728 (1980).
39 Id. at § 335, at 143.
40 These distinctions are frequently utilized in the reverse to allow a servient estate owner to build subterranean or aerial structures which do not interfere with the easement owner’s right of way. See Western Massachusetts Electric Co. v. Sambo’s of Massachusetts, Inc., 8 Mass. App. Ct. 815, 823, 398 N.E. 2d 729, 734 (1979) and cases cited therein.
42 Id. at 733, 477 N.E.2d at 203.
43 It is true that the intent of the parties is generally irrelevant to prescriptive acts. Id. at 736, 477 N.E.2d at 204. But here, unlike the buildings in Pappas or Brooks, the obstruction by stones and wire strands is not as clearly adverse to the easement. Thus, the intentions of the parties are relevant in evaluating the adverse nature of the fence.
44 Id. at 734 n.3, 477 N.E.2d at 203 n.3.
45 Id.
46 Actual or constructive notice is a precondition to prescription insured by the requirements that the use be open and notorious. 2 Thompson on Real Property § 335, at 141 (1980).
An instructive case is *Desotell v. Szczygieł*. Factually similar to *Yagjian*, *Desotell* involved a ten foot right of way easement established by deed over a servient estate. The defendant owner of the servient estate sought to extinguish the easement by showing that an open, continuous, adverse use had obstructed the right of way for more than twenty years. Specifically, the defendant pointed to trees, boulders, brush, and a dump located on the easement as adverse to passage. The Supreme Judicial Court of Massachusetts found no adverse use. The Court held that the obstructions on the right of way did not conclusively establish an adverse use because the defendant did not prove that she had planted, placed, or maintained the obstructions herself. As a result, the *Desotell* Court did not find the easement extinguished.

The *Desotell* Court presumably demanded a stronger showing of adverse use from the defendant servient estate owner than mere evidence of obstructions on the easement because those obstructions in and of themselves did not alert the plaintiff easement owner to any adverse use. Requiring a clear adverse use, such as the buildings in *Pappas* or *Brooks*, or other indicia of adversity, such as required in *Desotell*, is appropriate, since prescription is a narrowly restricted and disfavored doctrine.

Considering the circumstances surrounding the fence in question, the *Yagjian* court erred in supporting the lower court’s determination of prescription merely on a summary analysis of the adverse nature of the fencing. This is particularly true where the evidence suggests that during the twenty year prescription period the parties did not regard the stones or wire strands as adverse to the plaintiff’s easement. *Yagjian* allowed the defendants to make use of a questionably adverse fence built by previous owners, despite the apparent belief of those defendants in the continuing vitality of the easement.

*Yagjian* continues the traditional balancing of easement owners’ interests in maintaining their easements with servient estate owners’ interests in utilizing their property around that easement. The appeals court emphasized the present nature of that use — an unbroken fence denying passage — and found it adverse, and therefore, prescriptive. The

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48 Id. at 154, 154 N.E.2d at 700.
49 Id. at 159, 154 N.E.2d at 702.
50 Id. at 156, 154 N.E.2d at 700.
51 Id. at 159–60, 154 N.E.2d at 702.
52 Id.
53 Id. at 160, 154 N.E.2d at 702.
54 See supra note 39.
55 The *Yagjian* court refused to attempt to identify the actual motives or circumstances of whoever constructed the fence, but relied exclusively on the current objective nature of the fence itself. See *Yagjian*, 19 Mass. App. Ct. 733, 736, 477 N.E.2d 202, 204 (1985).
Yagjian decision underscores the need for easement owners to guard their interests vigilantly against both new and established encroachments. Wherever possible, owners should remove these encroachments, or give the servient estate owner written permission to retain them. This is particularly true where the easement owner is not actively using the easement or property, and therefore possibly not as attentive to adverse use, as was probably the case in Yagjian.\textsuperscript{56} Furthermore, easement owners should not rely on the original intentions of any prior servient estate owner. Yagjian makes it clear that any obstructions or adverse use will be evaluated on the basis of the current, objective nature of the interference.\textsuperscript{57} Where easement owners fail to guard against prescription, Massachusetts courts will extinguish their rights.

\section*{§ 6.2. Implied Easements in Involuntary Conveyances — The Need for Grantor's Intent.}\textsuperscript{*} Massachusetts courts have recognized implied easements for the benefit of a grantee when a parcel of land conveyed was formerly owned in common with another parcel and enjoyed some use over the other parcel until the time of conveyance.\textsuperscript{1} Before granting an implied easement, however, the courts have required the purchaser to prove that the easement sought was reasonably necessary for the enjoyment of the land, and that the use of the retained parcel for the benefit of the conveyed parcel was reasonably ascertainable by the holder of the common parcels prior to the severance of title.\textsuperscript{2} Where, for example, a grantor conveys a landlocked parcel surrounded by property which the grantor owns, courts will recognize the existence of an easement of access despite the absence of a contractual clause transferring it.\textsuperscript{3} Such an easement by implication will be presumed only where it is necessary, necessity being limited to easements for access to public roads, or where it was clearly the intention of the parties to create the easement.\textsuperscript{4} Where

\textsuperscript{56} The property in Yagjian was apparently undeveloped at the time of the litigation. \textit{Id.} at 734, 477 N.E. 2d at 203.

\textsuperscript{57} \textit{Id.} at 736, 477 N.E. 2d at 204.

\textsuperscript{*} David S. Newman, staff member, \textit{Annual Survey of Massachusetts Law}.

\textsuperscript{1} Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 104, 187 N.E. 227, 229 (1933).

\textsuperscript{2} \textit{Id.} at 104-05, 187 N.E. at 229-30.

\textsuperscript{3} See Hart v. Deering, 222 Mass. 407, 410, 111 N.E. 37, 38 (1916). Although the city subsequently built a public way which accessed the property, the Court in \textit{Hart} stated that "before Ionia Street was established as a public way there existed as appurtenant to the dominant estate a right of way such as was reasonably necessary and convenient for the purposes for which it was impliedly granted." \textit{Id.}

\textsuperscript{4} See Prentiss v. Gloucester, 236 Mass. 36, 52, 127 N.E. 796, 799 (1920). The \textit{Prentiss} Court stated that a 'grant by implication of an onerous servitude upon other land of the grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed unless
no necessity or clear intent is found, the easement is denied.\textsuperscript{5} During the Survey year, the Massachusetts Appeals Court, in \textit{Flax v. Smith},\textsuperscript{6} extended the application of implied easements to property conveyed involuntarily pursuant to a taking for nonpayment of taxes\textsuperscript{7} and sold by tax sale.\textsuperscript{8} The \textit{Flax} decision indicates that, in the case of a tax sale, an implied easement may be recognized although the transferor did not intend to convey the easement.

In \textit{Flax}, three parcels of land in Jamaica Plain, A, B, and C, were owned in common prior to 1966, and the residences on parcel A were serviced by water and sewer lines which ran under parcel C.\textsuperscript{9} In 1966, the city of Boston took parcel A for nonpayment of taxes.\textsuperscript{10} In 1978, the plaintiff, Steven Flax, purchased the property (parcel A) at a tax sale.\textsuperscript{11} The three parcels were situated such that parcels B and C fronted the street, where the main water and sewer lines are located, and parcel A lay behind parcels B and C.\textsuperscript{12} Although a thin strip of land connected parcel A to the street, the strip was surfaced by a driveway covering rock ledge three to ten feet deep.\textsuperscript{13} Due to the presence of the pavement and the ledge, the cost of labor to lay new pipes would be drastically inflated and was estimated at $4,800, exclusive of the costs of the pipe and the connection.\textsuperscript{14}

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\item such is clearly the intention of the parties;\textsuperscript{7} . . . the only necessity contemplated in ordinary cases is that of access to public highways; and that the great desirability of a way for purposes of prospect, is not a sufficient reason to extend or modify the general rule.
\item \textit{Id.} at 52 (quoting Regan v. Boston Gas Light Co., 137 Mass. 37, 43 (1884)).
\item \textit{Id.} See Bentley v. Mills, 174 Mass. 469, 469–70, 54 N.E. 885, 886 (1899) (Where grantor sold two properties, one which contained the sole access to the rear of the buildings, the Court granted no implied easement, despite the prior common use of the way, because neither necessity nor intent of the grantor was shown).
\item \textit{Id.} See Bentley v. Mills, 174 Mass. 469, 469–70, 54 N.E. 885, 886 (1899) (Where grantor sold two properties, one which contained the sole access to the rear of the buildings, the Court granted no implied easement, despite the prior common use of the way, because neither necessity nor intent of the grantor was shown).
\item Flax, 20 Mass. App. Ct. at 150, 479 N.E.2d at 184. These lines were in continuous use since 1950. \textit{Id.}
\item Parcel A was taken for nonpayment of taxes in 1966 pursuant to G.L. c. 60, § 53. The taking was confirmed by the land court in 1974. \textit{Id.} at 150, 479 N.E.2d at 184.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 150–52, 479 N.E.2d at 184.
\end{itemize}
Steven Flax sued Herbert Smith, the trustee for realty trusts holding the adjacent parcels B and C, seeking an injunction restraining the defendants from interfering with his water supply, damages for past interference, and a declaratory judgment that defendants’ lots were subject to easements for water and sewer lines. Finding the expense and difficulty involved in laying new pipelines to be excessive, the superior court judge determined that there was reasonable necessity for the claimed easement. The court found that when the city first took possession of parcel A for nonpayment of taxes, the city presumably intended to claim the benefit of the existing use of water and sewer lines. Therefore, the judge ruled that an easement for the use of parcels B and C by parcel A existed by implication. The trial court enjoined Smith, the holder of parcels B and C, from interfering with the reasonable use of the easement by Flax, the subsequent purchaser of parcel A from the city.

The Appeals Court of Massachusetts affirmed the factual findings and the decision of the superior court, and expanded on its reasoning. The court first found that Flax’s claimed easement could survive only under the law of implied easements, since Flax did not contend that he had either an express easement or an easement by prescription. The court then noted that implied easements in Massachusetts applied to land formerly in common ownership, where one parcel enjoys the use of another until the time of severance of ownership, and where that use is reasonably ascertainable and reasonably necessary for the enjoyment of the other parcel. Aside from the particular means of conveyance, a tax sale, the

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15 At the commencement of this action, Templeton Street Realty Trust and Hosmer Street Realty Trust were represented by two trustees. In the current action, Herbert Smith succeeded the prior trustees. Flax, 20 Mass. App. Ct. at 149 n.1, 479 N.E.2d at 184 n.1.
16 Flax, 20 Mass. App. Ct. at 150 n.2, 479 N.E.2d at 184 n.2. The defendants counterclaimed seeking an order to enjoin Flax from using the lines and to pay for past use.
17 Id. at 152, 479 N.E.2d at 184.
18 Id.
19 Id.
20 Id. The judge focused on the intent of the grantee to receive the easement, in contrast to traditional analysis which focuses on the intent of the grantor to transfer it. See, e.g., Perodeau v. O’Connor, 336 Mass. 472, 474, 146 N.E.2d 512, 514 (1957) (referring to implied easements, the Court stated “[t]heir origin must be found in the presumed intention of the parties”); Prentiss v. Gloucester, 236 Mass. 36, 52, 127 N.E. 796, 799 (1920) (quoting Regan infra); Regan v. Boston Gas Light Co., 137 Mass. 37, 43 (1884) (stating that “a grant by implication . . . is not to be presumed unless such is clearly the intention of the parties”).
21 Flax, 20 Mass. App. Ct. at 150 n.2, 479 N.E.2d at 184 n.2. The court also ordered Flax and Smith to share the cost of the water and sewer charges, and ordered Flax to install meters to measure his water usage. Id.
22 Id. at 152, 479 N.E.2d at 185 (citing G.L. c. 187, § 2).
court noted that the facts presented a clear case for an implied easement.\textsuperscript{24} As in other implied easement cases, the property was formerly in common ownership, residences on parcel A enjoyed the use of water and sewer lines up until the time of severance of ownership, the existence of this use was reasonably ascertainable, and reasonable necessity for continued use was established by the evidence.\textsuperscript{25}

The court next considered Smith's contention that an implied easement could not arise because the grantor did not intend to transfer such an interest.\textsuperscript{26} Because the entire transfer was involuntary, the court agreed that the grantor did not intend to transfer an easement.\textsuperscript{27} However, the court looked to the "presumed objective intent" of the grantor and the grantee based upon the circumstances of the conveyance, rather than looking to the subjective intent of the grantor, as Smith proposed.\textsuperscript{28}

In assessing the circumstances of the conveyance, the court emphasized the public policy considerations arising in the tax sale context, and the government's need for tax revenues.\textsuperscript{29} The court noted the need for cities to be able to take property for which taxes have not been paid, and the importance of ensuring that grantees of properties taken under tax title procedures receive the same rights as other grantees.\textsuperscript{30} Beyond emphasizing the importance of collecting taxes generally, the court further alluded to the benefit conferred on the grantor from the sale of the property with the easement, since the sale proceeds offset the taxes due on the property.\textsuperscript{31} Irrespective of the policy considerations, the court found that Smith received fair consideration for his property.\textsuperscript{32}

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  \item Id.
  \item Id. at 153, 479 N.E.2d at 185.
  \item Id.
  \item Id. (citing Restatement of Property § 476, comment g (1944)).
  \item Id. The court quoted 3 Powell, Real Property ¶ 410, at 34–60 (1984) (citing Buss v. Dyer, 125 Mass. 287, 291 (1878)) stating that "[t]he fictional implications of 'intent' are genuinely rooted in considerations of public policy." Id.
  \item Id. at 153, 479 N.E.2d at 185. See G.L. c. 60, §§ 37–61a (Massachusetts statute for collection by sale or taking of land). The court stated the policy behind the collection of taxes by quoting Napier v. Springfield, 304 Mass. 174, 177, 23 N.E.2d 157, 159 (1939): "The importance of collecting taxes in order that governmental functions may be discharged is universally recognized. In the collection of taxes, the public interest requires that land be taken for nonpayment of taxes and sold under such circumstances that the necessary revenues may be obtained." Flax, 20 Mass. App. Ct. at 153–54, 479 N.E.2d at 185–86.
  \item Id. at 154, 479 N.E.2d at 186.
  \item Id.
\end{itemize}
After establishing the reasonableness of granting the easement, the court looked for the parties' intent to transfer the easement. Although Smith's transfer was involuntary and he could not be presumed to have intended to transfer an easement, the court found that the city presumably did intend to take the property with the existing use for water and sewer lines. Therefore, the court held, since the grantor received fair consideration for the parcel transferred and there was presumed intent at the time of the taking to continue the use of existing pipe lines, the easement was implied in the ultimate conveyance to Flax.

While recognizing that easements have been granted previously in involuntary conveyances, the court proposed that implying an easement in an involuntary conveyance might require a degree of necessity greater than that required in a voluntary conveyance. Even this higher degree of necessity criteria was deemed satisfied, given the importance of water and sewer services and the substantial construction that would be required for Flax to install new pipes. Therefore, the court held that the involuntary nature of the conveyance did not affect the interest transferred, and the easement would still be implied.

In Flax, the court was faced with a compelling petition for an implied easement where the plaintiff could not prove all of the criteria traditionally required for courts to grant an implied easement. Typically, easements are implied where a parcel of land, which historically depended on some use of an adjacent commonly owned parcel, is conveyed without reference to an easement. To compensate for the lack of an express conveyance of the easement, courts insist that the circumstances of the transfer create an inference that the parties intended to transfer an easement. Where a grantor conveys a parcel of land voluntarily, courts infer that the grantor intended to transfer an easement interest if the use had become a necessary part of the transferred parcel and the grantor pre-
sumably transferred the property interest in its entirety.\textsuperscript{42} The Flax court's test for determining the existence of an implied easement in the case of an involuntary transfer closely resembles the traditional test applied to voluntary conveyances.

The Flax court held that an easement may be implied in an involuntary conveyance where: parcels were commonly owned, the transferred parcel had use of the other parcel up until the time of transfer, the use was reasonably ascertainable, and the use was reasonably necessary for the enjoyment of the property.\textsuperscript{43} The only discernible difference between the Flax court's test for an implied easement in an involuntary transfer and the traditional test for finding implied easements in voluntary transfers is in the intent requirement. In a voluntary conveyance, the grantee must demonstrate that the circumstances of the transfer indicate that the grantor intended to transfer an easement.\textsuperscript{44} Courts will infer what the parties would have concluded had they considered the question at the time of the transfer.\textsuperscript{45} The Flax court, however, noted that an involuntary grantor does not intend to make any transfer. Therefore, any inference of an intent to transfer an easement was precluded.\textsuperscript{46}

The Flax court suggested that where a conveyance is involuntary, a grantee may be required to show a greater degree of necessity for an easement to be implied.\textsuperscript{47} This stricter requirement for necessity in involuntary transfers counterbalances the requirement in voluntary transfers that the plaintiff prove that the grantor intended to transfer the easement interest. Requiring a greater showing of necessity eliminates the anomaly whereby an unwilling grantor with no opportunity to protect his property against subservience (by carefully drafting the contract for conveyance), may be more easily deprived of the easement interest than a voluntary grantor who could have protected himself by contract.\textsuperscript{48} By placing a greater burden on plaintiffs seeking to establish an easement over the land of a defendant, courts can protect defendants from being unfairly deprived of property interests which they did not intend to transfer. The Flax court proposed this higher standard and noted that Flax was able to satisfy it.\textsuperscript{49} This enhanced requirement may become a

\textsuperscript{42} See id.
\textsuperscript{44} See id. at 153, 479 N.E.2d at 185; see also cases cited supra at note 4.
\textsuperscript{45} Restatement of Property § 476, comment a (1944).
\textsuperscript{47} Id. at 154, 479 N.E.2d at 186.
\textsuperscript{48} This strict approach comports with the practice which draws inferences against voluntary conveyors more readily than against involuntary conveyors. See Restatement of Property § 474, comment b (1944).
\textsuperscript{49} Flax, 20 Mass. App. Ct. at 154, 479 N.E.2d at 186. The court stated, "It may be,
factor in future actions seeking implied easements from involuntary conveyances.

The facts of the *Flax* conveyance, apart from the involuntariness, typify the circumstances in which courts presume grantor intent and create easements by implication. The involuntariness of a transfer, however, precludes a court from finding that a grantor intended to burden his remaining property.\(^{50}\) While the *Flax* court properly found that the lack of intent in the involuntary transfer did not change the interest transferred, a minor extension of the court's reasoning could modify the law of implied easements by disregarding the fiction of intent in all transfers where intent is not specifically manifested.\(^ {51}\) Because courts determine the presence of intent by reviewing the prior use of the property and the necessity of the easement for the enjoyment of the land transferred,\(^ {52}\) the intent requirement is little more than a legal fiction.

The *Flax* court noted that fictional implications of intent are rooted in public policy.\(^ {53}\) Public policy supports the efficient use of land. Therefore, where a party conveys a landlocked parcel of land without reference to an easement for access, and prior to the conveyance the party crossed other land he owned to access public roads, the courts will imply an easement of access.\(^ {54}\) Courts generally grant easements of necessity irrespective of presumed intent because of policy concerns.\(^ {55}\)

In situations where the transferee's need for an easement is not as urgent as the need for access to public roads, courts may look to the relative equities of the parties to the conveyance. The financial burden placed on the grantee if the easement is denied, and the diminution in value of the property have been assessed.\(^ {56}\) These considerations of public policy for efficient land use, allocations of financial burdens, and diminution in property value are clearly not reflections of the intent of

\(^{50}\) *Id.* at 153, 479 N.E.2d at 185.

\(^{51}\) See, e.g., *Mt. Holyoke Realty Corp. v. Holyoke Realty Corp.*, 284 Mass. 100, 104, 187 N.E. 227, 229 (1933) ("There are cases where a simple circumstance may be so compelling as to require the finding of an intent to create an easement.")

\(^{52}\) *Mt. Holyoke Realty*, 284 Mass. at 105, 187 N.E. at 230.


\(^{54}\) *Buss v. Dyer*, 125 Mass. 287, 291 (1878). See also 3 *POWELL, REAL PROPERTY* § 410, at 34–67 (1984) (the finding of an easement by necessity came to be supported by public policy in order to prevent land from remaining nonusable).

\(^{55}\) *Id.*

\(^{56}\) See *Mt. Holyoke Realty*, 284 Mass. at 103, 187 N.E. at 229 (where the Court granted an easement by implication to use a staircase of an adjacent building, despite the ability of the new owner to build a new stairway, because the necessary cost and resultant diminution in value would be unreasonable and disproportionate to the building value).
the parties, but rather reflect a balancing of the benefit to the grantee from granting the easement against the cost to the grantor.

The grantee in Flax sought the use of existing pipelines. Deprivation of this right would translate into an additional financial burden on the grantee in excess of $4,800. It may be assumed, therefore, that Flax would pay this much less for the property without the right to use the pipelines. From the grantor’s perspective, Smith would apparently enjoy no benefit from denying Flax the easement, except that Flax’s water and sewage would not run through his pipes. At the same time, the grantor would receive a smaller offset to his tax debt due to the lower price a grantee would be willing to pay at the tax sale, were the easement rights denied. A balancing of the equities clearly indicates the propriety of granting an easement by implication. The absence of “intent” appears irrelevant.

While this analysis is relatively simple in the present case regarding rights to use underground pipelines, complexities arise in scenarios where the grantor’s use of his remaining property would be seriously restricted by the easement sought. Even in these complex cases, however, intent is not essential (unless intent can be derived from the writing itself). Rather, the court should look to the relative equities of the parties. If the grantee seeks an easement to cross the middle of the grantor’s property where a private road has always been, the court should not be precluded from granting access along the border of the property, if the grantor’s development plan conflicts with the old road. Although it would be difficult to construe an intent of the parties to build a road in a more convenient location, the equities are truer indicators of propriety.

Where a grantee without any contractual rights seeks to acquire an easement over adjacent lands, a court should first establish that the lands were previously commonly owned, that the desired use did exist up until the time of severance of title, and that the use was reasonably necessary for the enjoyment of the land conveyed. Beyond these tests, the court should balance the relative equities of the grantor and the grantee in implying an easement. There is no need for a fictional search for intent, when justice may be best served by weighing the objective equities.

In summary, the Flax court held that a grantee who takes title to property taken by the city in tax proceedings and conveyed via tax sale

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58 Id. at 150–51, 479 N.E.2d at 184.
59 Where the intent of the parties in regard to the rights in question can be derived from an instrument of conveyance, in respect of the parol evidence rule, courts should look no further. See, e.g., Canton Highlands, Inc. v. Searle, 9 Mass. App. Ct. 48, 51 & n.3, 398 N.E.2d 759, 760 & n.3 (1980) (where parties possessed rights by reason of an express grant, extrinsic evidence is inadmissable in the absence of ambiguity).
§ 6.2 PROPERTY

will receive the same rights as a grantee in a voluntary conveyance. The court noted that a traditional prerequisite for courts granting an implied easement, that the grantor have intended to transfer the rights in question, was absent because an involuntary transferor has no intent to transfer. The court overcame the obstacle, however, by recognizing the importance of enabling cities to collect taxes, by presuming that the city intended to take the appurtenant rights along with the property, and by noting that the grantor benefited from the increase in the value of the property due to the inclusion of the appurtenant rights. The court added a measure of protection for the involuntary grantee by proposing that the degree of necessity required to grant an easement by implication following an involuntary conveyance might be greater than that required in the case of a voluntary conveyance.

The Flax decision minimizes the importance of presumed intent in determining what rights might be implied to have been conveyed along with a property. It might be recognized further that the search for intent is not a proper test for making such determinations. The courts have traditionally balanced the equities of the grantor and grantee in determining how to allocate rights. This balancing test can replace the fiction of presuming intent without any harm to the future of property rights.

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61 Id.
62 Id. at 154, 479 N.E.2d at 186.
63 Id.